Petition

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No. 81-953

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

LAWRENCE W. CLEARY, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Fourth Amendment was violated by a warrantless probable cause search of a canvas bag with a broken zipper, from which the butt of a handgun was protruding, that was found in the passenger compartment of a van during a lawful search of the van.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Reasons for granting the petition	7
Conclusion	10
Appendix A	1a
Appendix B	18a
Appendix C	19a

TABLE OF AUTHORITIES

Cases:

Arkansas v. *Sanders*, 442 U.S. 753	5, 7, 9
Cady v. *Dombrowski*, 413 U.S. 433	9
New York v. *Belton*, No. 80-328 (July 1, 1981)	6, 7
Robbins v. *California*, No. 80-148 (July 1, 1981)	6, 7, 9
United States v. *Chadwick*, 433 U.S. 1	5, 9
United States v. *Moschetta*, 646 F.2d 955, petition for cert. pending *sub nom. United States* v. *Spieler*, No. 81-908	9
United States v. *Ocampo*, 650 F.2d 421	8
United States v. *Ross*, cert. granted, No. 80-2209 (Oct. 13, 1981)	7, 8, 9, 10

Constitution and statute:

United States Constitution:	
Fourth Amendment, Warrant Clause	6, 8
Fifth Amendment	5
18 U.S.C. 472	2

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The corrected opinion of the court of appeals (App. A, *infra*, 1a-17a) is reported at 656 F.2d 1302.[1] The district court rendered no opinion.

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[1] The court of appeals' original opinion was published in the advance sheets at 645 F.2d 740, but was withdrawn by the court and accordingly does not appear in the permanent edition of the Federal Reporter. The withdrawn opinion neither governs the disposition of this case nor establishes any precedent for future cases. Moreover, the corrected majority opinion differs from the original only by the addition of footnote 9 (App. A, *infra*, 8a-9a n.9). Accordingly, we have not reproduced the original opinion here.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 18a) was entered on May 18, 1981. An order denying the government's petitions for rehearing (App. C, *infra*, 19a) was entered on September 8, 1981.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

An indictment filed in the United States District Court for the Southern District of California on April 9, 1980, charged respondent and co-defendant Stephanie Feiler with possessing and concealing counterfeit federal reserve notes, in violation of 18 U.S.C. 472. Prior to trial, respondent and Feiler moved to suppress evidence seized by San Diego Police officers during a warrantless search of respondent's van and of a canvas bag found inside the passenger compartment of the van. Following a hearing, the district court denied the suppression motions. Respondent was convicted of the charge against him after a non-jury trial on stipulated facts, and was sentenced to two years' imprisonment. The court of appeals reversed.

1. Evidence developed during the suppression hearing showed that on March 30, 1980, while on routine patrol at the San Diego International Airport, Harbor Police Officer Reginald Schumacher noticed a Dodge van in a parking lot adjacent to the airport. Although the day was quite warm, the occupants of the van had the windows rolled up. Shortly

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[2] The court of appeals' corrected opinion was issued in response to the rehearing petitions on that date. See note 1, *supra*. The court of appeals' judgment was not modified, however.

after Officer Schumacher noticed the van, which had been parked facing east, the driver made a 180° turn in the lot so that it faced west and provided its occupants with a view of most of the lot. As Schumacher approached the van, which had out-of-state tags, he noticed that its left-hand side mirror was broken. He tapped on the door of the van, intending to advise the driver that operation of the van with a broken mirror placed him in violation of California law. Respondent, who was in the driver's seat, rolled the window down part way. Schumacher immediately detected a strong odor of marijuana and observed that respondent had his hands in his lap, covering an object that was emitting faint traces of smoke. Schumacher asked respondent what he was holding; respondent did not answer. Respondent turned the object in his hands (a pipe) upside down and began dumping its contents onto the floor of the van. Officer Schumacher again asked to see the object in respondent's hands. When respondent continued to empty the pipe, Schumacher reached through the window and grabbed it. (App. A, *infra*, 2a; Tr. 4-11.)[3]

Officer Schumacher asked respondent and Feiler, who was sitting on the passenger side of the van, for their licenses. As he handed Schumacher his driver's license, respondent shoved the van door outward as if trying to exit. Schumacher pushed respondent back into the van, held the door closed, and summoned assistance. (App. A, *infra*, 2a; Tr. 12-13.) When two other officers arrived, respondent and Feiler were asked to get out of the van (Tr. 13, 22). Respondent was handcuffed because he "was

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[3] "Tr." refers to the transcript of the suppression hearing conducted on May 12 and 13, 1980.

quite excited and jumping around" (Tr. 36-37). Schumacher asked respondent if there was additional marijuana, and respondent replied: "Check the bags between the seats. That's where she keeps it" (Tr. 14). Schumacher leaned through the open door of the van on the passenger side and saw a canvas-type bag with a broken zipper between the front seats. He noticed the butt of a handgun protruding from the bag; the rest of the gun was covered up with clothing. Schumacher took the bag from the van, removed the gun from the bag, and unholstered it to determine if it was loaded. The gun, a Ruger .44 magnum single-action revolver, was loaded with five rounds of semi-jacketed, hollow point ammunition. Officer Schumacher then reholstered the gun and returned it to the canvas bag. (App. A, *infra*, 2a; Tr. 14-16, 25-26, 35, 39.)

Respondent and Feiler were placed under arrest for possession of a loaded firearm, transported to the police office inside the airport, and advised of their constitutional rights. The officers again removed the gun from the bag. In doing so, they moved some newspaper inside the bag, which caused a stack of currency to fall over. An inspection of the serial numbers revealed that the currency was counterfeit. The officers also found a small amount of marijuana seeds and leaves inside the bag. United States Secret Service agents were then called into the investigation. Pursuant to regulations requiring the seizure of vehicles that have been used to transport counterfeit currency, the Secret Service agents took custody of the Dodge van and made an inventory of all items contained therein. During the course of the inventory search the agents found 12 additional counterfeit notes lying in plain view on the floorboard of the

van, between the two front seats (App. A, *infra*, 2a-3a; Tr. 16-18, 24, 40-43).

On the basis of the foregoing facts, the district court denied the motions to suppress (Tr. 73).[4] Respondent proceeded to trial and was convicted of the charge against him.

2. A divided court of appeals reversed respondent's conviction, holding that, despite its broken zipper, respondent had a legitimate expectation of privacy in the canvas bag that rendered the warrantless search of its contents unlawful. The court accordingly directed suppression of the currency as fruit of that search.

a. The court held that whether an individual has a reasonable expectation of privacy in any particular container does not hinge upon precautions taken by that person (such as locking the container) that manifest a subjective expectation of privacy (App. A, *infra*, 3a-5a). Instead, the court stressed "the inherent nature of the container itself" (*id.* at 5a). The court extended the warrant requirement identified in *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), at least to all those "items commonly perceived as being designed for carrying and storing personal effects

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[4] In denying the suppression motions, the district court rejected respondent's contention that the discovery of the canvas bag inside the van was the fruit of an interrogation which violated respondent's Fifth Amendment rights because not preceded by *Miranda* warnings (Tr. 73):

> I credit the testimony of Officer Schumacher and do not credit [respondent's] testimony as to the location of the bag with the gun in it. I think that that gun had been discovered in the normal course of his lawful investigation regardless of what [respondent] may have said, without advice of his Miranda warnings.

or papers and which have some sort of device to keep them closed" (App. A, *infra*, 6a; footnote omitted).[5]

Nor, in the court's view, did the canvas bag's broken zipper, which made the bag impossible to close, diminish respondent's expectation of privacy in the bag, since a bag with a broken zipper "still gives notice to the outside world of its essentially private character" (App. A, *infra*, 7a).

b. The government filed a petition for rehearing, urging, *inter alia*, that the court's resolution of the instant case be stayed pending decisions by this Court in *Robbins* v. *California*, No. 80-148 (July 1, 1981), and *New York* v. *Belton*, No. 80-328 (July 1, 1981). Following this Court's decisions in those cases, the court of appeals directed the government to file a supplemental petition for rehearing addressing their bearing upon this case.

The court of appeals ultimately denied the government's original and supplemental petitions for rehearing (App. C, *infra*, 19a). However, the court filed a revised opinion (App. A, *infra*, 1a-9a), adding footnote 9, distinguishing this case from *Belton* and finding its holding reinforced by *Robbins*.[6]

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[5] The court stressed that the test articulated "sets forth a minimum" (App. A, *infra*, 6a nn.4,5). The court noted that canvas bags without any fastening device and even paper bags, might also deserve the protection of the Warrant Clause, especially where precautions taken by the owner reflect a heightened expectation of privacy (*ibid.*). Thus, the court apparently rejected only the use of such indicia of subjective expectations to undercuit the privacy status of a seemingly secure container, but not their use to bolster the privacy status of insubstantial containers.

[6] The court distinguished *Belton* on the ground that the search in which the counterfeit currency was discovered was removed in time and place from the arrest. The court added

Judge Wright dissented (App. A, *infra*, 10a-17a).[7] Relying on Justice Powell's opinion concurring in the judgment in *Robbins* v. *California*, *supra*, he concluded that, because the canvas bag was unsealed, no warrant was required to search it. He further suggested that footnote 13 of *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 764-765, supported the warrantless search here, seeing "no difference between a canvas bag with a protruding gun and a gun case" (App. A, *infra*, 13a).[8]

REASONS FOR GRANTING THE PETITION

The question presented in this case is a variation on that presented in *United States* v. *Ross*, cert. granted, No. 80-2209 (Oct. 13, 1981). In *Ross*, the District of Columbia Circuit held that a warrantless search, based upon probable cause, of a closed but unsealed paper bag found in the trunk of the defendant's automobile during a lawful search of the

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that there was no need to decide whether a search incident to arrest might be resumed at a later time and place, without a warrant, as a continuation of the earlier initiated search, because the searching officer's testimony indicated that he had never begun a search of the canvas bag at the arrest scene (*id* at 8a-9a n.9). The court of appeals also considered its decision to be compatible with *Robbins*, relying exclusively upon the plurality opinion in that case.

[7] Judge Wright substantially revised his original dissent in response to the rehearing petitions and the intervening decisions in *Robbins* and *Belton*.

[8] In *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 764-765 n.13, this Court noted that certain containers could be searched without a warrant, citing as examples containers whose contents are in plain view and containers, such as a gun case, which disclose their contents.

automobile, was precluded by the Fourth Amendment. As in our petition in *Ross*, a copy of which has been provided to counsel for respondent, we contend here that there are certain containers, which offer only minimal protection against accidental or deliberate intrusion, whose use is inconsistent with a reasonable expectation that their contents will remain private once the container is separated from its owner. In our view, a canvas bag with a broken zipper, which cannot be closed, is such a container. By selecting such a container an individual demonstrates a lack of interest in assuring the privacy and security of the bag's contents. Because such a bag lacks the integrity, security and privacy attributes normally associated with luggage, it cannot support a legitimate expectation of privacy sufficiently strong to evoke the protection of the Warrant Clause.[9] See *United States* v. *Ocampo*, 650 F.2d 421, 426 (2d Cir. 1981) (unzipped flight bag does not command a legitimate expectation of privacy). This is particularly clear in the instant case, for respondent placed a loaded gun in the mouth of the bag in a position which made it visible from the outside of the bag. Such casual placement of the gun rendered unreasonable any subjective expectation of privacy that respondent might have entertained in the bag: respondent could hardly have expected that law en-

[9] Contrary to the implication of the majority opinion below (App. A, *infra*, 7a), we do not accept the view that a conclusion that no warrant is required is the same as a conclusion that there is no expectation of privacy in the item or area to be searched. Some items, such as automobiles, embody limited expectations of privacy, so that a search of the item is regulated by the reasonableness requirement of the Fourth Amendment but may be conducted without a warrant. Respondent's bag is, we submit, such an item.

forcement officers would not remove a weapon found in this manner and thereby discover what lay beneath. See *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 763-764 n.11; *United States* v. *Chadwick*, *supra*, 433 U.S. at 15 n.9; *Cady* v. *Dombrowski*, 413 U.S. 433, 447-448 (1973).

In view of the similarity between the question presented here and that presented in *United States* v. *Ross*, *supra*, the Court may wish to hold this petition pending the disposition of *Ross*. That course appears particularly appropriate given the court of appeals' reliance upon the plurality opinion in *Robbins* v. *California*, and this Court's directive that the parties in *Ross* address the question whether *Robbins* warrants reconsideration.[10]

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[10] Officer Schumacher had properly removed the gun from the bag in the parking lot to see if it was loaded, and discovered that it was loaded with five rounds of ammunition. There can, in our view, be little question but that, once the bag and respondent had been taken to the airport office, the officers were entitled to remove the gun from the bag. Cf. *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 763-764 n.11; *United States* v. *Chadwick*, *supra*, 433 U.S. at 15 n.9; *Cady* v. *Dombrowski*, *supra*, 413 U.S. at 447-448; *United States* v. *Moschetta*, 646 F.2d 955, 959 (11th Cir. 1981), petition for cert. pending *sub nom. United States* v. *Spieler*, No. 81-908. As the officers removed the gun from the bag, the counterfeit money fell into plain view. Accordingly, in our brief on appeal, and again in our petitions for rehearing, we argued that the counterfeit money was properly seized under the plain view exception to the warrant requirement. The court below evidently rejected that contention *sub silentio*. We have not sought further review of that ruling in this Court because we doubt that the question warrants plenary review here. However, we assume that the argument remains available, should the Court ultimately remand this case for consideration in light of *Ross*.

CONCLUSION

The Court should dispose of this petition as is appropriate in light of its disposition of *United States* v. *Ross*, No. 80-2209.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1981

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-1557

D.C. No. CR 80-239

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

LAWRENCE WILLIAM CLEARY, JR., DEFENDANT-APPELLANT

Filed Sep. 8, 1981

Appeal from the United States District Court
for the Southern District of California
Leland C. Nielsen, District Judge, Presiding
Argued and submitted February 5, 1981

Before: WRIGHT and NELSON, Circuit Judges, and EAST *, District Judge

CORRECTED OPINION

NELSON, Circuit Judge:

Lawrence Cleary appeals from his conviction for possession and concealment of counterfeit bills with intent to defraud, a violation of 18 U.S.C. § 472. Because we find that the bills on which the conviction was based were found pursuant to an unconstitutional search, we reverse.

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* The Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

I. Fact Summary

While on routine patrol at the San Diego Airport, Harbor Police Officer Reginald Schumacher approached a van with a broken side mirror and tapped on the driver's side window. When Cleary, the appellant, opened the window slightly, Schumacher smelled marijuana. Cleary's hands appeared to be covering an object from which a trace of smoke was rising. The officer reached in and seized the object—a marijuana pipe—and asked Cleary and his passenger, Stephanie Feiler, for their driver's licenses. As Cleary handed his license to Schumacher, he reached for the door and appeared to Schumacher to be attempting to get out. Schumacher pushed the door closed and called for assistance.

When the other officers arrived, Cleary and Feiler were allowed to exit the van. Cleary was handcuffed. Without giving Cleary his *Miranda* warnings, Schumacher asked Cleary if he had any more marijuana, to which Cleary responded that there was more inside. Schumacher then looked into the van and removed a canvas-type bag with a zipper (which was broken). When he seized the bag, which was partially wrapped in clothing, he noticed what appeared to be the butt of a gun partially visible. When Schumacher took the bag to a secure location, he removed from it a .44 magnum revolver. He then put the weapon back in the bag and arrested both Cleary and Feiler.

Subsequently, Cleary, Feiler and the bag were transported to the Harbor Police facility at the airport. There, Schumacher emptied the bag without securing a warrant and seized some marijuana debris and counterfeit currency. Secret Service agents later returned to the van and searched its entire contents

without a warrant, discovering more counterfeit currency.

The trial court denied Cleary's motion to suppress the counterfeit currency, and he was convicted in a stipulated facts trial.

II. Reasonable Expectation of Privacy

Because it is clear that the fruits of the warrantless search of the canvas bag must be suppressed if there was a reasonable expectation of privacy in its contents, *United States* v. *Chadwick*, 433 U.S. 1, 13 (1977), the only issue we need to face in this case is whether such an expectation attaches to a canvas bag with a broken zipper.[1] We hold that it does.

Our starting points for analytical guidance are the Supreme Court's two major decisions on the expectation of privacy in containers of personal effects: *Chadwick*, *supra*, and the more recent *Arkansas* v. *Sanders*, 442 U.S. 753 (1979).

In *Chadwick*, federal narcotics agents arrested three men and seized a double-locked two hundred pound footlocker as it was being placed in the trunk of a car after a narcotics dog signaled the presence of a controlled substance inside the footlocker. An hour and a half later, agents opened the footlocker without a warrant and discovered a large amount of marijuana. In affirming the suppression of the fruits

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[1] Because our holding in this case requires suppression of the counterfeit evidence that supplied the basis for Cleary's conviction, we need not examine his other arguments that were designed to reach the same result. We also note that we are only concerned here with what was found in the bag's interior and not visible from the outside. Obviously, exposed objects could be seized under the plain view doctrine. *See Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

of this warrantless search, the Supreme Court noted that the protections of the fourth amendment, including the warrant requirement, were not restricted to the context of the home. Here important privacy interests were at stake:

> By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protections of the Fourth Amendment Warrant Clause.

433 U.S. at 11.

This language left *Chadwick* subject to differing interpretations. What were the critical attributes imbuing this footlocker with its reasonable expectation of privacy? How important were the individualized steps cited by the Court as manifesting such an expectation, such as double locking the trunk? Clearly, one could read *Chadwick* as requiring such subjective manifestations, and were this the intended meaning of the *Chadwick* Court, it would argue against finding such an expectation in the canvas bag found in this case.

That such a reading of *Chadwick* is incorrect, however, was made clear by the Court in *Arkansas* v. *Sanders*, 442 U.S. 753 (1979). In *Sanders*, police stopped a taxi containing in its trunk a suitcase that had been described by an informant as containing marijuana. They opened the unlocked suitcase without consent or a warrant and discovered the marijuana in it. The holding in *Sanders* was that warrantless searches of *personal luggage* were unconstitutional even when the luggage was seized from an

automobile. In including an unlocked suitcase within the protected ambit of personal luggage, it is clear that the Court did not rely on the types of precautions that indicate a subjective expectation of privacy (i.e. double locking) found in *Chadwick*. Rather, the critical factor relied on was the objective nature of the suitcase as personal luggage, *i.e.* the inherent nature of the container itself rather than the behavior of its owner. In order to understand how to make this now critical determination as to what constitutes personal luggage, we turn to the *Sanders* discussion.

In *Sanders*, as in *Chadwick*, the Court noted that "luggage is a common respository for one's personal effects, and therefore is *inevitably* associated with the expectation of privacy." 442 U.S. at 762 (emphasis added).[2] Further, in discussing the differences between the footlocker in *Chadwick* and the suitcase in *Sanders*, the Court said:

> We do not view the differences in the sizes of the footlocker and suitcase as material here; nor did respondent's failure to lock his suitcase alter its fundamental nature as a repository for personal, private effects.

Id. at 762-63, n. 9.

Given these comments, and mindful of the desirability of drawing clear lines in fourth amendment

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[2] The analysis of expectations of privacy is thus fundamentally different than when dealing with other types of containers where the expectation is not "inevitable." *See United States* v. *Mackey*, 626 F.2d 684, 687 (9th Cir. 1980) (noting that reasonable expectation of privacy standard is composed of both objective and subjective aspects in case analyzing expectation of privacy in a paper bag).

adjudication, *see id.* at 768 (Blackmun, J. dissenting)[3], we feel confident in holding, at a minimum[4], that the term "personal luggage" encompasses those items commonly perceived as being designed for carrying and storing personal effects or papers and which have some sort of device to keep them closed.[5]

The canvas bag in the instant case would clearly meet this test and therefore qualify as personal lug-

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[3] Justice Blackmun correctly anticipated the large number of cases in which courts would have to analyze different types of containers. *See* cases cited by dissent, *infra*, at notes 2-5. We hope that the rule set forth here will dispose of the need for repeated detailed analysis in a significant class of cases.

[4] We emphasize that this test sets forth a minimum. Other types of containers could conceivably be classified as personal luggage. *See* note 4, *infra*. Still other containers may also have the requisite expectation of privacy, particularly when affirmative steps taken by their owners give rise to an implication of such a subjective expectation. Thus while in some circumstances a paper bag might not support such an implication, *see United States* v. *Portillo*, 633 F.2d 1313, 1320 (9th Cir. 1980); *United States* v. *Mackey*, 626 F.2d 684, 687 (9th Cir. 1980); *but see United States* v. *Ross*, No. 79-1625 (D.C. Cir. March 31, 1981) (en banc) (applying *Sanders* to require warrant to search closed but untaped paper bag), like the dissent we note that such a container, if secured or sealed, would seem to support such an inference.

[5] Again, we emphasize that this test sets forth a minimum. Although we do not reach the issue, it may well be that, for example, a canvas bag without a closing device could still be considered personal luggage, and thus carry an expectation of privacy in those contents not in plain view. Such a conclusion would not necessarily run afoul of the Court's cautionary note in *Sanders*, 442 U.S. at 764, n. 11 [*sic*], which explicitly mentioned as containers with no such expectation packages whose contents could be inferred from their outward appearance (e.g. a gun case) or were subject to plain view.

age when new.[6] Therefore we next need to consider whether the changed condition of this bag, which made it impossible to close, somehow "alters its fundamental character as a repository for personal, private effects." We think it does not. Even a bag with a broken zipper retains its fundamental character as a private repository—it still gives notice to the outside world of its essentially private character.[7] Further, the dramatic consequences of an alternative approach must be considered. Holding that there is no reasonable expectation of privacy in such a bag would remove it not just from the warrant requirement in a situation in which the police already have probable cause, but completely out of the realm of *any* fourth amendment protections. *See, e.g., Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978) (citing *Katz* v. *United States*, 389 U.S. 347 (1967) for the proposition that capacity to claim the protection of the fourth amendment depends upon whether the individual claiming it has a legitimate expectation of privacy in the invaded place). To hold that a mechanical breakdown creates fundamental changes with such sweeping consequences would seem a bit

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[6] While the bag was not in evidence before the district court, it was described in testimony. It was an canvas bag approximately 12 inches high, 8-10 inches wide and eighteen inches long. As noted previously, the bag had a zipper which did not work.

[7] To require further that the closing mechanism be kept in perfect working order would return the analysis to the difficult area, rejected in *Sanders* for personal luggage, of individual manifestations. Further, were we to hold to the contrary, the principle would be difficult to contain. If a broken zipper on a canvas bag eliminates an expectation of privacy, why wouldn't a broken clasp on a purse work the same fundamental change?

extreme. Finally, the clarity of our approach is an obvious asset. The alternative would seem to plunge the police (and courts) into a morass of slippery and largely irrelevant considerations.[8]

Because we conclude that Cleary had a legitimate expectation of privacy in the canvas bag, the fruits of its warrantless search must be suppressed under *Chadwick* and *Sanders*.[9]

REVERSED.

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[8] Among the inevitable issues would be the appropriate treatment of partially closable or partially closed (beyond what is in plain view) luggage. We feel the more objective analysis suggested by the Court in *Sanders* precludes the necessity of engaging in such difficult and unproductive exercises.

[9] The Supreme Court's recent decisions in *New York* v. *Belton*, 49 U.S.L.W. 4906 (U.S. July 1, 1981) and *Robbins* v. *California*, 49 U.S.L.W. 4915 (U.S. July 1, 1981) do not compel a different result.

Belton involved the permissible scope of a contemporaneous search at the scene of and incident to a lawful arrest. The *Belton* Court emphasized the contemporaneous nature of the search. *See* 49 U.S.L.W. at 4916 ("[W]e hold that . . . a policeman . . . may, as a *contemporaneous* incident of that arrest, search the passenger compartment of that automobile." (emphasis added)); *id.* at 4917 ("The search of the respondent's jacket followed immediately upon that arrest."). The *Belton* Court distinguished *Chadwick* because, in *Chadwick*, " 'the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or justified by any other exigency.' " *Id.* at 4917, *quoting Chadwick*, 433 U.S. at 15. This case, like *Chadwick*, involves a search removed from the arrest both geographically and temporally, and hence cannot be justified as incident to that arrest.

The government also argues that the stationhouse search was merely the completion of the initial search incident to the

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arrest and could still be justified on that basis. The facts negate this argument, whatever its legal merit. The officer was very careful while testifying to emphasize that he only removed the gun, the butt of which was in plain view, and checked to see if it was loaded or empty. He then replaced the gun without any examination of the interior contents of the bag. Thus there was no search of the bag at the scene of the arrest. We therefore need not address whether the "incident to arrest" exception, designed to protect police officers and prevent destruction of evidence by arrestees, *see, e.g., Belton*, 49 U.S.L.W. at 4915, would support "continuation" searches removed in time and place from the scene of the arrest where the destruction and protection factors are absent.

The *Robbins* decision is also compatible with our result here. There the Court explained the negative implications of note 13 of the *Sanders* opinion, *see* note 5 *supra*, as being that "unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment." 49 U.S.L.W. at 4908. As noted in note 1, *supra*, we are only concerned here with objects not visible from the exterior of the bag and hence not subject to a plain view analysis.

WRIGHT, Circuit Judge, dissenting:

With due respect for the views of my colleagues, I dissent.

The key issue remains whether Cleary had a reasonable expectation of privacy in the contents of an open canvas bag. I conclude he did not.

Fourth Amendment protection against warrantless searches applies only if Cleary had a subjective expectation of privacy that society is prepared to recognize as reasonable and legitimate. *Rakas* v. *Illinois*, 439 U.S. 128, 143-44 n.12 (1978). In considering reasonableness, a court must examine

> whether a person invoking the protection of the Fourth Amendment took normal precautions to maintain his privacy—that is, precautions customarily taken by those seeking privacy.

Id. at 152 (Powell, J., concurring).

A container that does not demonstrate this expectation may be searched with probable cause when it is lawfully obtained by the police. *United States* v. *Mannino*, 635 F.2d 110, 113 (2d Cir. 1980). Otherwise, a warrantless search is permissible only if a recognized exception to the warrant requirement applies. *Id.*

Cleary's container was an open canvas bag with a broken zipper. It was approximately 12 inches high, 8 to 10 inches wide, and 18 inches long.[1] The butt of a handgun was protruding from the top.

In *United States* v. *Chadwick*, 433 U.S. 1 (1977), the Supreme Court held that Chadwick's use of a double-locked footlocker "manifested an expectation

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[1] The bag was not placed in evidence. The description of it is taken from the officer's testimony.

that the contents would remain free from public examination." *Id.* at 11. Absent exigency, search of it was unreasonable without a warrant.

In *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), the court found a manifestation of an expectation of privacy in an unlocked suitcase because it was traditionally a repository of personal items. The court recognized, however, that

> some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant.

Id. at 764-65 n.13.

In *Robbins* v. *California*, 49 U.S.L.W. 4906 (July 1, 1981), the conscious manifestation of an expectation of privacy proposition received majority support. However, there was disagreement about how such a "manifestation" is to be gauged. The plurality declared a "bright-line" rule that the use of a closed, opaque container indicates in every case a manifestation of an expectation of privacy. However, it recognized the two exceptions already described in *Sanders*. As a legal matter, an expectation of privacy would not be deemed manifested where (1) the closed opaque container is suggestive of its contents, and (2) the container is open. Generally, the court said, the two exceptions describe occasions when the contents of the container have been left in "plain view." *Id.* at 4907-08.[2]

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[2] The majority's reliance on the *Robbins* plain view language, *see* footnote 9 *ante*, seems to suggest a visibility test

Justice Powell concurred in the result but disagreed with the "bright-line" rule. He suggested that the manifestation of an expectation of privacy should be judged on a case-by-case basis, taking into consideration the container's size, shape, material and condition, the context of its discovery, and whether its possessor has taken some significant precaution, such as locking, sealing, or binding to indicate a desire to prevent its contents from being displayed upon simple mischance. 49 U.S.L.W. at 4909 n.3 (Powell, J., concurring).

Applying Justice Powell's test to this case I do not find that Cleary manifested an expectation of privacy. His bag was not closed, sealed, secured, or secreted so as to signal any "significant precaution . . . to prevent the contents from being displayed upon simple mischance." *Id.*[3]

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for which I do not believe there is support in *Robbins*. Such a test would mean that the contents of even an open, neutral container are protected so long as they are not immediately visible to an officer. Neither this court nor the Supreme Court has given "plain view" so restrictive a meaning. *See Coolidge* v. *New Hampshire*, 403 U.S. 433 (1971); *United States* v. *Wheeler*, 641 F.2d 1321 (1981). Certainly the result cannot turn upon the accidental positioning of the officer either to see or not see the contents of an open, nonsuggestive container. Likewise, the mere use of some neutral container does not denote an expectation of privacy. The test of *Robbins* must be whether the use of the container goes beyond mere convenience in transport of contents to the conscious hiding of the contents from public view.

[3] The majority recognizes a protected expectation of privacy in this bag because it concludes that the bag is a form of "personal luggage" within the meaning of *Sanders*. The majority defines "personal luggage" as items "commonly perceived as being designed for" carrying personal effects and which have

Moreover, Cleary's bag comes within both *Sanders* exceptions. I see no difference between a canvas bag with a protruding gun and a gun case. Both suggest the presence of one or more guns. If the warrantless search of the gun case for guns is proper, so is the warrantless search of the canvas bag.

Because the bag was open, it also comes within the second *Sanders* exception. To read *Robbins* as saying that the second *Sanders* exception requires any more than that the container be open would be contrary to the overwhelming weight of precedent since *Sanders*. With one exception, I have found no federal or state cases decided after *Sanders* that hold a reasonable expectation of privacy attaches to an open container.

The vast majority of cases finding a reasonable expectation of privacy involve containers that are closed,[4]

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a closing device. Without further discussion, it holds that the canvas bag meets this test.

This test is passe in light of *Robbins, supra*. There the Supreme Court made clear that the characterization of the container as personal luggage is irrelevant. 49 U.S.L.W. at 4907.

[4] *See United States* v. *Ross*, No. 79-1624 (D.C. Cir., March 31, 1981) (en banc) (closed paper bag); *United States* v. *Benson*, 631 F.2d 1336, 1337 (8th Cir. 1980) (closed but unlocked leather tote bag); *United States* v. *Bella*, 605 F.2d 160 (5th Cir. 1979) (closed guitar case); *United States* v. *Calandrella*, 605 F.2d 236, 247 (6th Cir.), *cert. denied*, 444 U.S. 991 (1979) (closed briefcase); *United States* v. *Gooch*, 603 F.2d 122, 125 (10th Cir. 1979) (closed briefcase); *United States* v. *Meier*, 602 F.2d 253, 255 (10th Cir. 1979) (closed but unlocked backpack); *United States* v. *Johnson*, 588 F.2d 147, 151-52 (5th Cir. 1979) (closed duffel bag); *United States* v. *Schleis*, 582 F.2d 1166, 1170 (8th Cir. 1978), *cert. denied*, 444 U.S. 991 (1979) (closed combination locked briefcase); *Matter of B.K.C.*, 413 A.2d 894 (D.C. 1980) (closed but unlocked briefcase); *State* v. *Felipi*, 297 N.W.2d

zipped shut,[5] taped shut,[6] or otherwise sealed or

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275 (Minn. 1980) (closed duffel bag); *State* v. *Daniel*, 589 P.2d 408 (Alaska 1979) (closed but unlatched briefcase); *People* v. *Dalton*, 157 Cal.Rptr. 497 (Cal. 1979), *cert. denied*, 445 U.S. 946 (1980) (closed metal box in trunk); *State* v. *Delong*, 602 P.2d 665 (Or. 1979) (closed camera case in trunk); *State* v. *Groda*, 591 P.2d 1354 (Or. 1979) (closed briefcase in trunk). *But see Liles* v. *State*, 375 So.2d 1094 (Fla. 1979) (warrantless search of partially open leather or vinyl satchel unconstitutional because contents were not in plain view).

[5] *See United States* v. *Ross*, *supra*, note 4 (zippered leather pouch); *United States* v. *Rigales*, 630 F.2d 364, 366 (5th Cir. 1980) (zippered leather case); *United States* v. *Garcia*, 605 F.2d 349, 352 (7th Cir. 1979), *cert. denied*, 446 U.S. 984 (1980) (zippered but unlocked suitcases; warrantless search permissible because of exigent circumstances); *United States* v. *Haley*, 581 F.2d 723, 725 (8th Cir.), *cert. denied*, 439 U.S. 1005 (1978) (zippered leather briefcase; warrantless search permissible because of exigent circumstances); *Commonwealth* v. *Tunka*, 417 A.2d 620 (Pa. 1980) (zippered valise); *People* v. *Minjares*, 591 P.2d 514 (Cal.), *cert. denied*, 444 U.S. 887 (1979) (zippered tote bag); *State* v. *Hassapelis*, 404 A.2d 232 (Me. 1979) (zippered gym bag). *But see United States* v. *Markland*, 635 F.2d 174, 177 (2d Cir. 1980) (warrantless search of zippered vinyl Schlitz beverage bag permissible because bag not normally used for transporting personal items and no objective step taken to signal privacy; zipping shut not enough).

[6] *See United States* v. *Dien*, 609 F.2d 1038, 1045 (2d Cir. 1979), *adhered to on rehearing*, 615 F.2d 10 (2d Cir. 1980) (taped cardboard box behind the driver's seat inside a van, the windows of which had been painted over); *United States* v. *O'Campo*, 492 F. Supp. 1211 (E.D.N.Y. 1980) (taped cardboard box in trunk); *United States* v. *Rivera*, 486 F. Supp. 1025 (N.D. Tex. 1980) (securely taped plastic garbage bags); *Cooper* v. *Commonwealth*, 577 S.W.2d 34 (Ky. 1979) (heavily taped razor case under front seat; warrantless search permissible because of exigent circumstances and lesser intrusion

secured.[7]

By contrast, an open flight bag,[8] open paper bags,[9] closed but unsealed paper or plastic bags,[10] and other containers not normally used to transport personal

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than impoundment). *But see United States* v. *Blair*, 493 F. Supp. 398 (D. Md. 1980) (warrantless search of taped cardboard boxes permissible because boxes are not repositories of personal effects).

[7] *See Walters* v. *United States*, 100 S.Ct. 2395 (1980) (securely wrapped and sealed cartons); *United States* v. *Presler*, 610 F.2d 1206, 1212 (4th Cir. 1979) (securely locked briefcases); *State* v. *Blair*, 416 A.2d 1253 (Me. 1980) (rolled up, opaque plastic bag in trunk); *Luchon* v. *State*, 419 A.2d 1041, 1042 (Md. 1980) (large, semi-opaque plastic bag "crumpled together on top of the open end," wrapped around defendant's arm, and being held by his other arm); *Pinner* v. *State*, 411 A.2d 135 (Md. 1980) (duffle bag under carpet under passenger seat); *State* v. *White*, 615 P.2d 1004 (N.M. 1980) (sealed cardboard boxes and onion or sugar sacks tied at the top in the trunk); *State* v. *Grundy*, 607 P.2d 1235 (Wa. 1980) (padlocked footlocker); *State* v. *Schrier*, 283 N.W.2d 338 (Iowa 1979) (latched knapsack; warrantless search permissible after seeing contents when pushed flap aside without unlatching).

[8] *See O'Campo, supra* note 6 (warrantless search of open and unsecured flight bag permissible).

[9] *See United States* v. *Honigman*, 633 F.2d 1336 (9th Cir. 1980) (open Safeway paper bag); *United States* v. *Mannino*, 635 F.2d 110 (2d Cir. 1980) (open white plastic bag).

[10] *See United States* v. *Foskey*, 636 F.2d 517 (D.C. Cir. 1980) (brown paper bag fastened around the neck of a gas pipe in an automobile); *United States* v. *Brown*, 635 F.2d 1207 (6th Cir. 1980) (closed but unsealed paper bag); *United States* v. *Portillo*, 633 F.2d 1313, 1315-1316 (9th Cir. 1980) (closed paper bag). *But see United States* v. *Ross, supra* note 4 (expectation of privacy attaches to closed but unsealed paper bag).

items,[11] are not found to be attended by a reasonable expectation of privacy.

Finally, whatever expectation of privacy Cleary may have had in his canvas bag, if incident to arrest, the search may have been reasonable. *United States* v. *Belton*, 49 U.S.L.W. 4915 (July 1, 1981), announces a "bright-line" rule justified by the general confusion among courts and law enforcement officers regarding the scope of search incident to arrest in automobile cases.

The "workable definition" of that scope now is that the passenger compartment and any containers within, whether open or closed, may be searched without a warrant. The rule applies even where the defendant is not in the compartment or where the searched containers are not immediately accessible or beyond reach—*i.e.*, the traditional *Chimel* rationale of officer protection does not necessarily underlie the new rule. Nor does the Court specify how long after arrest such a search remains valid.

In Cleary's case, the bag was found between the two passenger seats of his van. Though the gun was withdrawn within the proximity of the van and just before Cleary's formal arrest, the rest of the bag's contents were not withdrawn until later. If we reached that issue, I would remand the case for a determination whether the subsequent search was

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[11] *See Vogel* v. *State*, No. 3, slip op. (Ct. App. Ala., October 28, 1980) (warrantless search of army-type duffel bags stuffed with brick-shaped objects permissible because contraband obvious); *Burkett* v. *State*, 607 S.W.2d 399 (Ark. 1980) (no expectation of privacy in burlap bags in locked trunk because they are not repositories of personal effects); *Flynn* v. *State*, 374 So.2d 1041 (Fla. 1979) (placing items in black plastic garbage bags fails to manifest expectation of privacy).

incident to arrest in light of *Belton*. It is unnecessary to reach that issue, however, because Cleary had no expectation of privacy.

I would affirm Cleary's conviction.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-1557
DC CR 80-239-1 LCN

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

LAWRENCE WILLIAM CLEARY, JR.,
DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

A TRUE COPY
ATTEST
Clerk of Court

by: /s/ Oscar Tagle
Deputy Clerk

Filed and entered May 18, 1981

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-1557

D.C. No. CR 80-239

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LAWRENCE WILLIAM CLEARY, JR., DEFENDANT-APPELLANT

Filed Sep. 8, 1981

Before: WRIGHT and NELSON, Circuit Judges, and EAST,* District Judge

ORDER

The Government's Petition for Rehearing, filed July 1, 1981, and its Supplemental Petition for Rehearing, filed July 27, 1981, are DENIED.

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* Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 358072 687

Opposition

No. 81-953

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

LAWRENCE W. CLEARY, JR.,

RESPONDENT.

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARC B. GELLER
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Attorney for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-953

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

LAWRENCE W. CLEARY, JR.,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The Government contends that it is not violative of the Fourth Amendment to conduct a warrantless search of a canvas bag, with a broken zipper, found in the passenger compartment of a van, during a lawful search, after being removed from the van, and after the suspects were in the custody of the arresting officers. The Government contends that certiorari should be granted to the United States Court of Appeals for the Ninth Circuit, since, in its opinion, the Court of Appeals held that a person has a reasonable expectation of privacy with respect

to a canvas bag with a broken zipper. 1/

The Government contends that the question presented in the instant case is a variation on that presented in United States v. Ross, cert. granted, No. 80-2209 (Oct. 13, 1981). Respondent contends, however, that his case is totally different from that of Ross, supra, since Ross concerned an unsealed ordinary paper bag; in contrast to the paper bag found in Mr. Ross' vehicle, the container in Respondent's case was "an [sic] canvas bag approximately twelve inches high, eight-ten inches wide and eighteen inches long. As noted previously, the bag had a zipper which did not work." United States v. Cleary, supra, at 1305, fn 6.

The case of United States v. Ross, supra, involved, specifically, the search of two (2) containers: (1) A paper bag, open at the top; and (2) a leather pouch. Id. at p. 15. In United States v. Ross, supra, the Court of Appeals, on rehearing en banc indicated that the paper bag should be afforded the same protection as was the leather pouch. Id.

In Ross, supra, the en banc court framed the issue presented as follows:

> ". . . [W]hether Sanders invisions and the Fourth Amendment tolerates a warrant rule covering small suitcases and pouches but not paper bags[?] . . ." United States v. Ross, supra.

Applying the facts, found in Ross, supra, to the aforementioned issue, the District of Columbia Circuit, en banc, held that although Ross' car was properly stopped and searched, and the pouch and bag were properly seized, no "special exigencies" justified opening the pouch or the bag without a warrant. The Court went on to state:

1/ The holding of the Court of Appeals, for the Ninth Circuit, was only examined under the reasoning found in United States v. Chadwick, 433 U.S. 1, 13 (1977); the Court of Appeals indicated, in its opinion, that other arguments could be made to reach the same results. United States v. Cleary, 656 F.2d 1302, 1303, fn 1.

". . . both containers were securely emoved from Ross' reach at the time of the seizure; the police entertained no belief that the containers or their contents endangered their personal safety; with the pouch and bag in police possession there was no risk that the evidence would be lost or destroyed before warrant could be obtained." Cf. People v. Belton, 50 N.Y.2d 447, 407 N.E.2d 420 (1980)(warrantless search of jacket pocket may not be upheld as search incident to arrest once object is within the exclusive control of the police), cert. granted, 49 U.S.L.W. 3515 (U.S. Jan. 19, 1981(No. 80-328)." United States v. Ross, supra.

Accordingly, the District of Columbia Circuit Court of Appeals based its ruling, in Ross, supra, on law which has since been overturned by this Honorable Court in New York v. Belton, No. 80-328 (July 1, 1981). The Ninth Circuit Court of Appeals, in the instant case, distinguished the facts found in Belton, supra, with those of the instant case:

"Because we conclude that Cleary had a legitimate expectation of privacy in the canvas bag, the fruits of its warrantless search must be suppressed under Chadwick and Sanders.

The Supreme Court's recent decisions in New York v. Belton, 49 U.S.L.W. 4906 (U.S. July 1, 1981) and Robbins v. California, 49 U.S.L.W. 4915 (U.S. July 1, 1981) do not compel a different result.

Belton involved the permissible scope of a contemporaneous search at the scene of and incident to a lawful arrest. The Belton Court emphasized the contemporaneous nature of the search. See 49 U.S.L.W. at 4916 ('[W]e hold that . . . a policeman . . . may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.'(emphasis added)); id. at 4917 ('The search of the respondent's jacket followed immediately upon that arrest.'). The Belton Court distinguished Chadwick because, in Chadwick, ''the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or justified by any other exigency.'' Id. 4917, quoting Chadwick, 433 U.S. at 15. This case, like Chadwick, involves a search removed from the arrest both geographically and temporally, and hence cannot be justified as incident to that arrest.

The government also argues that the stationhouse search was merely the completion of the initial search incident to the arrest and could still be justified on that basis. The facts negate this argument, whatever its legal merit. The officer was very careful while testifying to emphasize that he only removed the gun, the butt of which was in plain view, then replaced the gun without any examination of the interior contents of the bag. Thus there was no search of the bag at the scene of the arrest. We therefore need not address whether the 'incident to arrest'

> exception, designed to protect police officers and prevent destruction of evidence by arrestees, see, e.g., Belton, 49 U.S.L.W. at 4915, would support 'continuation' searches removed in time and place from the scene of the arrest where the destruction and protection factors are absent.
>
> The Robbins decision is also compatible with our result here. There the Court explained the negative implications of note 13 of the Sanders opinion, see note 5 supra, as being that 'unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment.' 49 U.S.L.W. at 4908. As noted in note 1, supra, we are only concerned here with objects not visible from the exterior of the bag and hence not subject to a plain view analysis." United States v. Cleary, supra, at 1305, fn 9.

The Government contends, in its petition for the instant writ that the Court of Appeals for the Ninth Circuit held, "whether an individual has a reasonable expectation of privacy in any particular container does not hinge upon precautions taken by that person (such as locking the container) that manifest a subjective expectation of privacy. 2/ The Court of Appeals never made this statement; rather, as the Government correctly notes in its decision, the Court stressed "the inherent nature of the container itself." 3/ Accordingly, as the Government correctly observes, the Court of Appeals merely extended the warrant requirement, identified in United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 442 U.S. 753 (1979), at least to all those "items commonly perceived as being designed for carrying and storing personal effects or papers and which have some sort of device to keep them closed." United States v. Cleary, supra, at p. 134-135.

Consistent with Sanders, supra and Chadwick, supra, the Ninth Circuit held that the canvas bag, in the instant case, would clearly meet the requirement and therefore qualify as personal luggage when it was new. The Court next considered whether the instant canvas bag automatically had an "alteration in its fundamental character as a repository for personal, private

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2/ Page 5, paragraph 2a of Government's Petition for a Writ of Certiorari, dated November, 1981.

3/ See page 5, Government's petition for Writ of Certiorari.

effects" when its zipper broke. The Court held it did not. Rather, the Ninth Circuit merely held that if a bag, or piece of luggage, is perceived as being designed for carrying and storing personal effects, or papers, its character is not altered merely because the locking device becomes inoperative. The reasoning of the Court of Appeals, as stated succinctly in its opinion is as follows:

> "To hold that a mechanical breakdown creates fundamental changes with such sweeping consequences would seem a bit extreme. Finally, the clarity of our approach is an obvious asset. The alternative would seem to plunge the police (and courts) into a morass of slippery and largely irrelevant considerations. The Supreme Court's recent decision in New York v. Belton, 49 U.S.L.W. 4906 (U.S. July 1, 1981) and Robbins v. California, 49 U.S.L.W. 4915 (U.S. July 1, 1981) do not compel a different result." United States v. Cleary, supra, at p. 1305.

In its petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, the Government framed its "reasons for granting the petition" as follows:

> "Whether a warrant must ordinarily be obtained in order to examine, with probable cause, the contents of unsealed paper bags or similar insubstantial containers that lack the fundamental attributes of, and are not imbued with the privacy expectations that extend to, luggage." 4/

It should be obvious that the reasons for granting the petition Ross are simply not present in the case at hand. 5/ Finally, the Government's analysis, in Ross, as applied to the instant case, totally rejects this Court's reasoning in Arkansas v. Sanders, 442 U.S. 753 (1979), which requires police to obtain a search

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4/ See page 7 of the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, United States v. Ross.

5/ In the instant petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, it states, "as in our petition in Ross, a copy of which has been provided to counsel for respondent, we contend here that there are certain containers, which offer only minimal protection against accidental or deliberate intrusion, whose use is inconsistent with a reasonable expectation that their contents will remain private once the container is separated from its owner. In our view a canvas bag with a broken zipper, which cannot be closed, is such a container. By selecting such a container an

warrant to search the contents of a container, when the container is one that generally serves as a repository for personal effects. United States v. Sanders, supra, at 764. 6/

Finally, it should be noted that in its petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, in Ross, the Government argues that Arkansas v. Sanders, supra, should not be applied retroactively, to effect the decision in Ross. Obviously, this argument has no merit in the case at hand.

Since the piece of luggage, in the instant case was one that is normally considered to be a repository for personal effects, as opposed to an ordinary paper bag, and since no exigencies are present in the instant case to excuse the requirement of a search warrant, the United States Court of Appeals for the Ninth Circuit correctly decided that it possessed Fourth Amendment protection. The decision of the Court of Appeals was consistent with this Honorable Court's reasoning in Rakas v. Illinois, supra, Katz v. United States, 389 U.S. 347 (1967), Arkansas v. Sanders, supra, Agnello v. United States, 269 U.S. 20, 33'(1925), United States v. Chadwick, supra, Robbins v. California, supra, and New York v. Belton, supra.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the petition for a writ of certiorari to the United States

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individual demonstrates a lack of interest in assuring the privacy and security of the bags' contents." (See page 8, Government's petition for the instant writ) This approach suggests that petitioner selected the bag with prior knowledge that its closing device was inoperative. This approach, as developed by the Government, is specifically what the Ninth Circuit attempted to avoid in the Cleary decision, when the Court stated, "to hold that a mechanical breakdown creates fundamental changes with such sweeping consequences would seem extreme. United States v. Cleary, supra, at p. 1305.

6/ See also United States v. Chadwick, 433 U.S. 1, 13 (1977); See also Rakas v. Illinois, 439 U.S. 128, 150-152 (1978).

Court of Appeals, for the Ninth Circuit, should be denied.

Respectfully submitted,

DATED: 1 February 1982.

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Telephone (714) 239-9457

Attorney for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

81-953

UNITED STATE OF AMERICA,

PETITIONER,

- vs -

LAWRENCE W. CLEARY, JR.,

RESPONDENT.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

ANN GARY, after first being duly sworn, deposes and says that pursuant to Rule 28.4(a) of this Court she served the within MEMORANDUM FOR THE RESPONDENT IN OPPOSITION on counsel for Petitioner by enclosing a copy thereof in an envelope, prior postage prepaid, addressed to:

The Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and depositing same in the United States mails at San Diego, California, on 2 February, 1982.

Ann Gary, Affiant

Subscribed and Sworn to before me
this 2nd day of February, 1982.

Lori Jean Prestidge, Notary Public in and for said County and State.

OFFICIAL SEAL
Lori Jean Prestidge
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires July 22, 1985

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JAN 18 1982
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	)	
Plaintiff-Respondent,	)	No. 80-1557
v.	)	
LAWRENCE WILLIAM CLEARY, JR.,	)	
Defendant-Appellant.	)	ORDER

Before: WRIGHT, Circuit Judge

Appellant Cleary has filed an emergency motion, received by the clerk on January 13, 1982, seeking appointment of counsel. The motion is well taken and is granted.

Marc B. Celler, Esq. is appointed counsel for Mr. Cleary and he will prepare the response to the government's petition for writ of certiorari.

EXHIBIT

ORIGINAL

IN THE ORIGINAL

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

81-953

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

LAWRENCE W. CLEARY, JR.,

RESPONDENT.

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Pursuant to 18 U.S.C. § 3006A(d)(6) and Rule 46 of this Court, the Respondent, Lawrence W. Cleary, Jr., asks leave to file the attached Memorandum in Opposition to the Petition for the Writ of Certiorari filed by Petitioner without prepayment of fees or costs and to proceed in forma pauperis. Respondent was previously represented by the undersigned on a retained basis. Pursuant to 18 U.S.C. § 3006A, on January 13, 1982, Respondent filed with the United States Court of Appeals for the Ninth Circuit an Emergency Motion for Appointment of Counsel to Respond to the Petition for Writ of Certiorari, filed by Petitioner. On January 18, 1982, the United States Court of Appeals, for the Ninth Circuit, granted Respondent's Emergency Motion to appoint Marc B. Geller, Esq., as counsel for Lawrence W. Cleary,

Jr. The Order is attached to this Memorandum as an exhibit.

Respectfully submitted,

DATED: 1 February 1982.

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Attorney for Respondent